

155 FERC ¶ 61,310
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Graphic Packaging International Inc.

Docket Nos. ER16-1051-000
ER16-1051-001

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION AND DENYING
WAIVER OF PRIOR NOTICE REQUIREMENT

(Issued June 27, 2016)

1. In this order, we grant Graphic Packaging International Inc. (Graphic Packaging) authority to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, effective May 2, 2016. We also grant Graphic Packaging's request for certain waivers commonly granted to market-based rate sellers, except as noted herein. Also as discussed below, we deny Graphic Packaging's request for waiver of the Commission's prior notice requirement.
2. Additionally, we find that Graphic Packaging meets the criteria for a Category 1 seller in all regions and is so designated.¹

¹ See *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, FERC Stats. & Regs. ¶ 31,374, at PP 320-322 (2015), *order on reh'g*, Order No. 816-A, 155 FERC ¶ 61,188 (2016). See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at PP 848-850, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

I. Background

3. On March 1, 2016, as amended on April 28, 2016 and May 5, 2016, pursuant to section 205 of the Federal Power Act (FPA),² Graphic Packaging filed an application for market-based rate authority with an accompanying tariff providing for the sale of electric energy, capacity, and ancillary services at market-based rates.³

4. Graphic Packaging states that it is a wholly owned subsidiary of Graphic Packaging Holding Company (Graphic Holding). It states that Boston Partners, a private investment firm, owns 11.62 percent of Graphic Holding's common stock.

5. Graphic Packaging owns a 26.895 megawatt (MW) cogeneration facility located in Santa Clara, California (Facility).⁴ Graphic Packaging states that the Facility is a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978, as amended (PURPA).⁵ Graphic Packaging represents that approximately 9 MW of the Facility's electrical output is consumed by Graphic Packaging's industrial processes, leaving approximately 17 MW for sale.

6. Graphic Packaging explains that on June 30, 2015, its PURPA power purchase agreements with Pacific Gas and Electric Company expired and Graphic Packaging then entered into a replacement power purchase agreement with Silicon Valley Power, a municipal utility, for Graphic Packaging to sell the net available electric energy capacity from the Facility to Silicon Valley Power for a five and one half-year term. Graphic Packaging states that Silicon Valley Power is not subject to state rate regulation and thus self-implements PURPA. Graphic Packaging requests that the Commission find that the contract entered into with Silicon Valley Power is analogous to the transitional five-year agreements approved by the State of California in implementing its PURPA program and that Graphic Packaging's sales under the contract did not trigger a filing obligation under section 205 of the FPA. Graphic Packaging states that the actual regulatory text creates an uncertainty that has resulted in the filing of this application out of an abundance of caution.

² 16 U.S.C. § 824d (2012).

³ Graphic Packaging requests authorization to sell ancillary services in the market administered by California Independent System Operator Corp. (CAISO).

⁴ Graphic Packaging states that in addition to the Facility, it owns a 72.984 MW QF facility located in Macon, Georgia. Graphic Packaging states that the output of this facility is consumed by the host load.

⁵ 16 U.S.C. § 824a-3 (2012).

7. Alternatively, Graphic Packaging requests that if the Commission finds that its purchase power agreement with Silicon Valley Power is not exempt from section 205 of the FPA and accepts this application, then the Commission find that no refund is due, consistent with the treatment of power purchase agreements in *Berry Petroleum Company*.⁶ Graphic Packaging states that the power purchase agreement with Silicon Valley Power is modeled on the transitional contract that the Commission found in *Berry* to be exempt from section 205 of the FPA. Graphic Packaging states that the only material difference between the Silicon Valley Power contract and the PURPA transitional contract approved in *Berry* is that the Graphic Packaging contract is with a municipality as opposed to the contracts in *Berry*, which were with companies that are subject to state rate regulation. Graphic Packaging explains that, as a municipality, Silicon Valley Power is not subject to state regulation and thus self-implements PURPA. Graphic Packaging requests that the Commission waive its prior notice filing requirement and permit the tariff to become effective on July 1, 2015, the effective date of the power sales contract with Silicon Valley Power. Graphic Packaging requests that the Commission exercise its discretion and not impose a refund requirement if the Commission determines that Graphic Packaging's sales to Silicon Valley Power fall outside of the exemption from section 205 of the FPA that is set forth in 18 C.F.R. § 292.601(c)(1).

II. Notice of Filings and Responsive Pleadings

8. Notice of Graphic Packaging's March 1, 2016, April 28, 2016, and May 5, 2016 filings was published in the *Federal Register* with interventions and protests due on or before May 26, 2016.⁷ None was filed.

9. Notice of Graphic Packaging's request for blanket authorization under Part 34 of the Commission's regulations was separately published in the *Federal Register*,⁸ with interventions and protests due on or before March 22, 2016. None was filed.

⁶ 140 FERC ¶ 61,186 (2012), *order on reh'g*, 143 FERC ¶ 61,223 (2013) (*Berry*). On rehearing, the Commission found certain power purchase agreements exempt from the requirements of section 205 of the FPA and determined that *Berry* was not required to obtain market-based rate authority before executing the agreements and that waiver of the prior notice requirement was unnecessary and refunds need not have been made.

⁷ 81 Fed. Reg. 12,096; 81 Fed. Reg. 28,860; 81 Fed. Reg. 29,561 (2016).

⁸ 81 Fed. Reg. 12,094 (2016).

III. Discussion

10. As discussed below, we will grant Graphic Packaging's request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates and we will accept its market-based rate tariff, effective May 2, 2016. We will also grant Graphic Packaging's request for certain waivers. As discussed below, we find that the exemptions from FPA sections 205 and 206 for sales made pursuant to a state regulatory authority's implementation of section 210 of PURPA do not apply in this instance. We deny Graphic Packaging's request for waiver of the prior notice requirement and order refunds.⁹

A. Market-Based Rate Authority

11. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.¹⁰

1. Horizontal Market Power

12. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.¹¹ The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.¹²

13. Graphic Packaging represents that all of the electrical output from the Facility is either fully committed under long-term power purchase agreements or is consumed on-site by the host load and is not sold into the wholesale market. Graphic Packaging adds that neither it nor its affiliates own or control any uncommitted generation. Based on these representations, we find that Graphic Packaging satisfies the Commission's requirements for market-based rates regarding horizontal market power.

⁹ Graphic Packaging is reminded that it must submit required filings on a timely basis, or face possible sanctions by the Commission.

¹⁰ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 62, 399, 408, 440.

¹¹ *Id.* P 62.

¹² *Id.* PP 33, 62-63.

2. Vertical Market Power

14. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file, or that such entity has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) or satisfies the requirements for blanket waiver under 18 C.F.R. § 35.28(d)(2).¹³

15. Graphic Packaging represents that neither it nor its affiliates own or control transmission facilities, except for limited and discrete interconnection facilities owned by Graphic Packaging. Graphic Packaging further states that it qualifies for the blanket waivers provided by Order No. 807 from the Commission's regulations concerning the obligation to file an OATT.

16. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.¹⁴ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities, and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).¹⁵ The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.¹⁶ The Commission adopted a rebuttable presumption that the

¹³ See *Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, FERC Stats. & Regs. ¶ 31,367, at P 57, *order on reh'g*, Order No. 807-A, 153 FERC ¶ 61,047 (2015) (waiving the OATT requirements of 18 C.F.R. § 35.28, the Open Access Same-Time Information System requirements of Part 37, and the Standards of Conduct requirements of Part 358, under certain conditions, for entities that own interconnection facilities). See also *Balko Wind Transmission, LLC*, 152 FERC ¶ 61,011, at PP 24-25 (2015).

¹⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

¹⁵ Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176. See also Order No. 816, FERC Stats. & Regs. ¶ 31,374 at PP 207-212 (removing the requirement that sellers report the acquisition of control of a site or sites for new generation capacity development for which site control has been demonstrated).

¹⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447. See also Order No. 816, FERC Stats. & Regs. ¶ 31,374 at PP 354, 356 (confirming that the affirmative statement regarding barriers to entry must be made with regard to a seller and its affiliates and amending 18 C.F.R. § 35.37 (e)(3) to specify that "a Seller is required to make an
(continued ...)

ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.¹⁷

17. Regarding other barriers to entry, Graphic Packaging represents that neither it nor its affiliates own or control inputs to electric power production that raise vertical market power concerns in the United States. Graphic Packaging states that it and its affiliates do not own or control intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, or physical coal supply sources, and they do not have ownership or control over who may access transportation of coal supplies.

18. Finally, consistent with Order No. 697, Graphic Packaging affirmatively states that Graphic Packaging and its affiliates have not erected barriers to entry in the relevant geographic market, and will not erect barriers to entry into the relevant market.

19. Based on Graphic Packaging's representations, we find that Graphic Packaging satisfies the Commission's requirements for market-based rates regarding vertical market power.

C. Waiver Requests

20. Graphic Packaging requests the following waivers and authorizations: (1) waiver of the filing requirements of subparts B and C of Part 35 of the Commission's regulations, except sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101, with the exception that waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects, and 141 of the Commission's regulations, except sections 141.14 and 141.15; and (3) blanket authorization under section 204 of the FPA¹⁸ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

affirmative statement that it and its affiliates have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.).

¹⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 446.

¹⁸ 16 U.S.C. § 824c (2012).

21. We will grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.¹⁹ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects Graphic Packaging to keep its accounting records in accordance with generally accepted accounting principles.

D. Waiver of Prior Notice Requirement

22. Section 205 of the FPA explicitly requires that rates be timely filed with the Commission.²⁰ In this regard, the Commission has explained that it cannot “ignore its statutory duty to determine whether rates are just and reasonable by permitting utilities to submit filings whenever convenient,” and that it “must have the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences.”²¹ Thus, a regulated entity must timely file its rates to allow the Commission to fulfill its statutory mandate, namely, timely determining whether the rates

¹⁹ We note that the Commission has examined and approved the continued applicability of the waiver of its accounting and reporting requirements in Parts 41, 101, and 141 of the Commission’s regulations, as well as the continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities in Part 34 of the Commission’s regulations. *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 984-985 (regarding waiver of Parts 41, 101, and 141) and PP 999-1000 (regarding blanket approval under Part 34). However, waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Hydropower licensees are required to comply with the requirements of the Uniform System of Accounts pursuant to 18 C.F.R. Part 101 to the extent necessary to carry out their responsibilities under Part I of the FPA. We further note that a licensee’s status as a market-based rate seller under Part II of the FPA does not exempt it from its accounting responsibilities as a licensee under Part I of the FPA. *See Seneca Generation, LLC*, 145 FERC ¶ 61,096, at P 23 n.20 (2013) (citing *Trafalgar Power Inc.*, 87 FERC ¶ 61,207, at 61,798 (1999) (noting that “all licensees are required to comply with the requirements of the Uniform System of Accounts to the extent necessary to carry out their responsibilities under [s]ections 4(b), 10(d) and 14 of the FPA”)). *See also* Order No. 816, FERC Stats. & Regs. ¶ 31,374 at PP 345-347 (clarifying that hydropower licensees that makes sales only at market-based rates and that have been granted waiver of Part 101 as part of their market-based rate tariffs may satisfy the requirements in Part 101 by following General Instruction No. 16 under Part 101).

²⁰ 16 U.S.C. § 824d (2012); *see, e.g., El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 9-11 (2003).

²¹ *El Paso Elec. Co.*, 105 FERC ¶ 61,131 at P 14.

being charged are just and reasonable. The Commission has further made clear that, for market-based rates in particular, it “does not allow market-based rates to go into effect before a filing has been tendered with the Commission.”²² In *Central Maine Power Company*,²³ *Central Hudson Gas and Electric Company*,²⁴ and *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*,²⁵ the Commission explained that it would grant waiver of the prior notice requirement for proposals to charge market-based rates only in extraordinary circumstances. The Commission has further explained that an applicant’s lack of awareness does not constitute extraordinary circumstances.²⁶

23. Graphic Packaging states that it “recently noticed a technicality,” namely that the Commission’s regulation exempting certain PURPA contracts from FPA section 205 only applies to contracts “entered into pursuant to a ‘state regulatory authority’s’ implementation of PURPA.”²⁷ Graphic Packaging argues that its contract with Silicon Valley Power is analogous to the agreements in *Berry*, which the State of California approved in implementing its PURPA program, and that entering into the contract did not trigger an FPA section 205 obligation. However, Graphic Packaging acknowledges that “technically, [its] sales to [Silicon Valley Power] from its QF Facility at the equivalent of avoided cost rates are not exempted from the Commission’s FPA section 205 rate regulation authority in section 292.601(c)(1) of the Commission’s regulations, even though municipalities like [Silicon Valley Power] have the same legal obligation as state regulatory authorities to implement PURPA and to establish their avoided cost rates.”²⁸ Graphic Packaging states that its obligation to obtain FPA section 205 authority “depends on a new interpretation of the Commission’s regulations and clarification of *Berry*,”²⁹

²² *El Segundo Power, LLC*, 84 FERC ¶ 61,011, at 61,060, *order on reh’g*, 85 FERC ¶ 61,123 (1998), *order on reh’g*, 87 FERC ¶ 61,208 (1999), *order on reh’g*, 90 FERC ¶ 61,036 (2000); *see also FC Landfill Energy, LLC*, 133 FERC ¶ 61,041 (2010); *BC Landfill Energy, LLC*, 127 FERC ¶ 61,113 (2009).

²³ 56 FERC ¶ 61,200, *order on reh’g*, 57 FERC ¶ 61,083 (1991).

²⁴ 60 FERC ¶ 61,106, *reh’g denied*, 61 FERC ¶ 61,089 (1992).

²⁵ 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993).

²⁶ *Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044, at P 30 (2007).

²⁷ March 1, 2016 Filing at 15 (quoting 18 C.F.R. § 292.601).

²⁸ *Id.* at 3.

²⁹ *Id.* at 15.

which Graphic Packaging claims constitute extraordinary circumstances justifying its tardiness in requesting market-based rate authority.³⁰

24. As Graphic Packaging notes, the plain language of 18 C.F.R. § 292.601(c)(1) limits the exemption to sales of energy and capacity that are “made pursuant to a state regulatory authority’s implementation of section 210” of PURPA.³¹ Additionally, Order No. 671 makes it clear that, in order to qualify for this exemption, QFs must fall under the regulatory oversight of the Commission or a state regulatory authority.³² Graphic Packaging notes that Silicon Valley Power is not subject to the jurisdiction of the California Public Utilities Commission. Thus, Graphic Packaging’s power purchase agreement does not qualify as a sale of energy or capacity made pursuant to a state regulatory authority’s implementation of section 210 of PURPA.

25. Based on the information presented by Graphic Packaging, Graphic Packaging has failed to demonstrate extraordinary circumstances warranting waiver of the 60-day prior notice requirement. While Graphic Packaging states that “the actual regulatory text creates an uncertainty that has resulted in the filing of this application . . . out of an abundance of caution,” the exemption in 18 C.F.R. §292.601(c)(1) has been in place for several years and the *Berry* decision on rehearing was issued in 2013. To the extent any uncertainty existed, Graphic Packaging has not explained why it could not have made this

³⁰ *Id.* at 16.

³¹ 18 C.F.R. § 292.601(c)(1) (2015). *See also Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 61,102, at PP 92, 95-96 (2006).

³² Order No. 671, FERC Stats. & Regs. ¶ 61,102 at P 95 (“When the Commission first granted the exemptions from sections 205 and 206 of the FPA in Order No. 69, there was no market for electric energy produced by non-utility generators. Indeed this was a primary reason that PURPA was enacted. The Commission wrote its regulations, including the provisions for exemptions from sections 205 and 206, with the expectation that all sales of electric energy from QFs would take place as a result of the section 210 of PURPA purchase obligation, and that they would take place pursuant to state regulatory authority implementation of the Commission’s avoided-cost rules under PURPA. Thus, there was no expectation that QFs would make sales that, by virtue of the Commission’s granting a broad exemption from sections 205 and 206 of the FPA, would be subject to neither this Commission’s nor a state regulatory authority’s oversight. However, largely as a result of PURPA, markets for electric energy produced by non-traditional power producers developed. And QFs participated in those markets and began to make sales that were not subject to either Commission or state regulatory authority oversight.”).

filing before entering into the contract with Silicon Valley Power. Accordingly, we deny Graphic Packaging's request for waiver of the 60-day prior notice requirement and an effective date of July 1, 2015. We grant Graphic Packaging's request for market-based rate authority to be effective May 2, 2016, 61 days after filing.

E. Refunds

26. The Commission has noted that if a utility files a market-based rate tariff fewer than 60 days prior to the proposed effective date of new service, and waiver is denied, the Commission will require the utility to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of the Commission's regulations,³³ for the entire period that the rate was collected without Commission authorization.³⁴ In addition to returning the time value of revenues collected for the period the rate was charged without Commission authorization, when dealing with market-based rates that are not timely filed, the Commission has stated that:

[T]he utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and a cost-justified rate. . . . In other words, the late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized late filing of cost-based rates, until the date of Commission authorization.³⁵

27. Graphic Packaging requests that the Commission find that no refund is due, consistent with the treatment of power purchase agreements in *Berry*. However, as discussed above, the instant agreement differs from *Berry*. In *Berry*, the contract was entered into under a state's implementation of PURPA and did not require market-based rate authority; thus, waiver of the prior notice requirement was unnecessary, and refunds were not due.³⁶ As noted above, Graphic Packaging's contract is with a municipality and is not subject to state oversight as the Commission's regulations require. Thus, we

³³ 18 C.F.R. § 35.19a (2015).

³⁴ *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC at 61,980.

³⁵ *Id.*; see 16 U.S.C. § 825h (2012). See *Southern California Water Co.*, 106 FERC ¶ 61,305, at PP 15-16, *reh'g denied*, 108 FERC ¶ 61,168 (2004). See also *Public Service Co. of Colorado*, 85 FERC ¶ 61,146, at 61,588 (1998).

³⁶ *Berry*, 143 FERC ¶ 61,223 at P 14. See also *S. Cal. Edison Co.*, 143 FERC ¶ 61,222 (2013) (finding that certain agreements are exempt from the requirements of section 205 of the FPA).

conclude that Graphic Packaging must refund all revenues resulting from the difference, if any, between the market-based rate and a cost-justified rate, plus the time value of revenues collected for the period the rate was charged without Commission authorization. Additionally, Graphic Packaging must submit a refund report detailing the basis for and calculations of the refunds paid.

F. Reporting Requirements

28. An entity with market-based rate authorization must file an Electric Quarterly Report (EQR) with the Commission, consistent with Order Nos. 2001³⁷ and 768,³⁸ to fulfill its responsibility under FPA section 205(c)³⁹ to have rates on file in a convenient form and place.⁴⁰ Graphic Packaging must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.⁴¹ Failure to timely and

³⁷ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008).

³⁸ *Electricity Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, FERC Stats. & Regs. ¶ 31,336 (2012), *order on reh'g and clarification*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

³⁹ 16 U.S.C. § 824d(c) (2012).

⁴⁰ *See Revisions to Electric Quarterly Report Filing Process*, Order No. 770, FERC Stats. & Regs. ¶ 31,338, at P 3 (2012) (citing Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 31).

⁴¹ Order No. 770, FERC Stats. & Regs. ¶ 31,338.

accurately file an EQR is a violation of the Commission's regulations for which Graphic Packaging may be subject to refund, civil penalties, and/or revocation of market-based rate authority.⁴²

29. Additionally, Graphic Packaging must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.⁴³

30. In Order No. 697, the Commission created two categories of sellers.⁴⁴ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888⁴⁵); that are not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power

⁴² The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2015). Forfeiture of market-based rate authority may require a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

⁴³ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2015).

⁴⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

⁴⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

issues.⁴⁶ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.⁴⁷

31. Graphic Packaging requests Category 1 seller status in all regions. Graphic Packaging represents that it qualifies as a Category 1 seller because it and its affiliates own or control 500 MW or less of generation in aggregate per region; do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generating facilities to the transmission grid; are not affiliated with anyone that owns, operates or controls transmission facilities anywhere in the United States and are not affiliated with a franchised public utility anywhere in the United States; and do not raise other vertical market power issues.

32. Based on Graphic Packaging's representations, we designate Graphic Packaging as a Category 1 seller in all regions. The Commission reserves the right to require an updated market power analysis at any time for any region.⁴⁸

The Commission orders:

(A) Graphic Packaging's market-based rate tariff is hereby accepted for filing, effective May 2, 2016, as discussed in the body of this order.

(B) Waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted.

(C) Waiver of Part 101 of the Commission's regulations is hereby granted, with the exception that waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Waiver of Parts 41 and 141 of the Commission's regulations is hereby granted, with the exception of sections 141.14 and 141.15.

(D) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted. Graphic Packaging is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate

⁴⁶ 18 C.F.R. § 35.36(a) (2015).

⁴⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

⁴⁸ *Id.* P 853.

purposes of Graphic Packaging, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(E) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Graphic Packaging's issuance of securities or assumptions of liability.

(F) Graphic Packaging's request for waiver of the prior notice requirement is denied, as discussed in the body of this order.

(G) Graphic Packaging is hereby ordered to make refunds, with interest, within 30 days of the date of this order, as discussed in the body of this order. Such refunds shall include the period that market-based rates were collected without Commission authorization, i.e., July 1, 2015 to May 1, 2016. Graphic Packaging is hereby directed to submit a refund report within 15 days thereafter, regarding the basis for and calculations of the refunds paid.

(H) Graphic Packaging is hereby required to file EQRs in compliance with Order Nos. 2001 and 768. If the effective date of Graphic Packaging's market-based rate tariff falls within a quarter of the year that has already expired, Graphic Packaging's EQRs for the expired quarter are due within 30 days of the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.